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No. 94-1522

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RONALD KEITH ALLRIDGE,

Petitioner,

v.

WAYNE SCOTT, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY TO RESPONDENT' S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioner Ronald Keith Allridge asks this Court to grant the writ of certiorari, and to reverse the decision of the circuit court below, for four reasons: the failure of the trial judge to instruct the jury on a crime, raised by the evidence, of which Petitioner was guilty if his defense was believed; the unconstitutional suppression of evidence helpful to his case by the prosecution; the decision of the trial judge to prevent the jury from knowing what fate awaited Petitioner should he be given a sentence of life rather than death; and the preclusion of an opportunity for Petitioner to present mitigating evidence at the punishment phase. The State's Opposition to the Petition for Certiorari ("Op. Cert.") provides scant assurance that the decision below passes constitutional muster on **any** of the cited grounds.

I. THE ILLOGICAL INSTRUCTION ON SIMPLE MURDER DID NOT EXONERATE THE DUE PROCESS VIOLATION OF DENYING A RATIONAL FELONY MURDER INSTRUCTION.

Ronald Keith Allridge was constitutionally entitled to a jury instruction on the crime of which the evidence showed he was guilty: felony murder.[1] His attorneys asked for it, his theory of defense was predicated substantially upon it, the State of Texas suppressed evidence conducive to it, and no other alternative to capital murder rationally conformed to the evidence. But the trial court refused to give a felony murder instruction. The jury -- deliberating the fate of a deadly robber whom it clearly could not acquit -- therefore convicted Allridge of capital murder.

When Allridge's attorney requested the obvious felony murder charge, the trial court stated without explanation, "Overruled." Vol. XXIX of the State Trial Court Record ("SR") 402-04. That otherwise inexplicable ruling was illuminated

[1] The evidence that Allridge's fatal shot was not intentional, but rather was a startled involuntary reflex, is recounted in his Petition for Writ of Certiorari ("Pet. Cert.") at 4, 9-10.

shortly afterward when Allridge's attorney sought a charge on the definition of the word "voluntary," and the trial court responded, "There is no evidence that the Court can remember that his act wasn't voluntary. So that's denied." SR Vol. XXIX, at 404-06.

The State of Texas does not dispute Allridge's analysis of *Beck v. Alabama*, 447 U.S. 625 (1980), and *Schad v. Arizona*, 501 U.S. 624 (1991). Instead, it responds solely with a defense of the "simple murder" instruction never previously raised: that the levels of *mens rea* for capital murder and simple murder are different ("intentional" versus "intentional or knowing"). The jury, it contends, accordingly had a satisfactory alternative to a conviction for capital murder, if it entertained doubt as to Allridge's intent.

This argument illustrates precisely the mischief to which *Schad* may be put, absent this Court's supervision. *Schad* expressly holds that, under *Beck*, due process is not satisfied by an instruction on "just any lesser included offense." 501 U.S. at 648. Here, however, what the jury heard was worse than "just any" extra instruction: it was a singularly "illogical" one,[2] since a conviction for murder effectively would have meant acquittal for armed robbery, a charge Petitioner did not seriously contest.

The key to the State's sole argument is its conspicuously conclusory statement that the jury "could have believed that [Allridge] pulled the trigger as a startled reaction to the sound of another shot and still have found him guilty of knowingly committing first-degree murder." Op. Cert. at 11-12. But this defies the plain meaning of words. Pulling a trigger as a startled involuntary reflex cannot constitute a knowing or intentional murder.[3] Such an accidental, unintended shooting may constitute

[2] The term is the Fifth Circuit's, to describe a "hypothetical verdict" of guilt for simple murder alone on this record. *See Allridge v. Scott*, 41 F.3d 213, 220 (5th Cir. 1994), Cert. Pet. at 12a.

[3] For first-degree murder, the requisite *mens rea* must attach to the *result* of the conduct. A "knowing" or "intentional" accidental shooting death is

felony murder, because the requisite *mens rea* for that crime under Texas law attaches to the underlying felony, not to the homicide. A felony murder instruction would have made sense; a simple murder instruction made none.

Ronald Allridge either intentionally shot and killed Carla Otto in the course of an aggravated robbery and was accordingly guilty of capital murder, or he accidentally shot and killed her as a startled reflex. These were the choices properly entrusted to the jury. Simple murder added nothing meaningful to the jury's deliberations: Allridge certainly did not kill Carla Otto other than in the course of a robbery, and there was not a shred of evidence, inference, or argument anywhere pertaining to the claim that he fired the fatal shot "knowingly," but not "intentionally."

The State quotes Allridge's attorney imploring the jury "to consider the lesser included charge of murder," Op. Cert. at 11 -- as though the very contortions to which the defense was put by the court's failure to give a constitutionally correct instruction somehow absolved that failure. Sadly evident in the State's very quotation, however, was that Allridge's attorney had absolutely nothing to commend the illogical murder charge, except the forlorn plea that the jury "consider" it, because it was not capital.

The simple murder instruction was an irrelevance: a caricature, rather than a vindication, of due process. If the trial court truly believed that the evidence could not support any conclusion other than that Allridge's fatal shot was intentional, then it should have dispensed with the alternative instruction altogether. But if some notion of "due process" nevertheless

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accordingly oxymoronic. *See Cook v. State*, 884 S.W.2d 485, 490-91 (Tex. Crim. App. 1994) (en banc). It is interesting that the State rests its entire due process justification upon the allegedly decisive distinction between "knowing" and "intentional," yet the highest criminal court of appeals in Texas refers to § 19.02 simple murder (the putative "alternative" in this case) as *"intentional* murder." *See id.*, emphasis added.

demanded an alternative to capital murder, then **felony murder** -- not requiring homicidal intent -- was the only rational choice.

The State's single justification for the denial of a felony murder instruction thus reduces to the arcane metaphysics of *mens rea*,[4] and a distinction without a difference in this case. The distinction between "knowingly" and "intentionally" -- even assuming the jury may have comprehended it[5] -- is irrelevant. Due process required that Allridge receive a felony murder instruction "if the evidence would permit the jury to rationally find him guilty of the lesser offense and acquit him of the greater." 41 F.3d 213, 218 (5th Cir. 1994) (Cert. Pet. at 9a).

There can be no doubt that the jurors, believing that he pulled the trigger of the shotgun unintentionally, could rationally have found Allridge guilty of felony murder, and not of capital murder. But they were denied that alternative. Instead, they were given an illogical superfluity refuted by the evidence itself.

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[4] "Few areas of criminal law pose more difficulty than the proper definition of the *mens rea* required for any particular crime." *United States v. Bailey*, 444 U.S. 394, 403 (1980). Thus did the American Law Institute's Model Penal Code devise a "hierarchy of culpable states of mind," commonly identified as purpose, knowledge, recklessness, and negligence. *Id.* at 404; *cf.* TEX. PENAL CODE ANN. § 6.02(d) (intentional, knowing, reckless, and criminal negligence). "Perhaps the most significant, and most esoteric, distinction drawn by this analysis is that between the mental states of 'purpose' and 'knowledge.' *Bailey*, 444 U.S. at 404 (further noting the "limited distinction between purpose and knowledge"). In light of *Beck*, perhaps the esoteric and counterintuitive nature of the distinction between "knowing" and "intentional" explains why neither the State nor any court, at any stage of these proceedings, advanced this position as a justification for denying Allridge the felony murder instruction.

[5] In Texas, the capital murder statute under which Allridge was convicted provides that capital murder comprises "murder,"-- *i.e.*, "intentionally **or** knowingly caus[ing] the death of an individual"-- and "intentionally commit[ting] the murder in the course of committing . . . robbery." Thus, compounding the confusion invariably attending *mens rea*, the jury was first instructed that capital murder may be committed "intentionally **or** knowingly," and then that it must be committed "intentionally." Allridge's attorney attempted to alleviate this additional confusion by clarifying the instruction to avoid any implication that capital murder could be knowing, rather than intentional, but this request was likewise denied. SR, Vol. XXIX, at 377-78.

That the jury **rationally** selected capital murder over acquittal -- the only remaining option -- reflects precisely the constitutional infirmity condemned by *Beck* and *Schad*.

II. THE SUPPRESSED CONFESSION OF PETITIONER'S ACCOMPLICE WAS *BRADY* MATERIAL, WHOSE DISCLOSURE WAS REQUIRED, AS RECOGNIZED BY THIS COURT IN *KYLES V. WHITLEY*.

The confession of Milton Ray Jarmon, one of the accomplices in the robbery at the Whataburger restaurant on the fateful night, recounts the sequence of gunshots, culminating in the one that ended the life of Carla Otto. There is no dispute that the State had the confession, and that it knowingly failed to provide it to defense counsel. Nor can there be reasonable doubt that it would have been helpful to the defense, since it tended to corroborate the "startled reflex" explanation of the fatal shot.

The State suggests that the confession would not have aided the defense, because it "revealed nothing about Allridge's state of mind when the fatal shot was fired." Op. Cert., at 14. But this is simply wrong: the capital offense of which Petitioner stood accused required the element of intent, and testimony that the shotgun blast closely followed the unexpected discharge of Jarmon's firearm most certainly could have been taken to support the inference of an unintentional, reflexive action by Petitioner.

Next, having already argued that there was **no** basis in the record for the jury to conclude that the killing was not intentional, the State contends that the Jarmon confession was **cumulative** to the extent that it spoke to that point.[6] Op. Cert., at 15. But surely the confession was repetitive only to the extent that the **number** of shots was in issue: in no way was it duplicative of other evidence concerning the critical matter of the shot **sequence**.

[6] The court of appeals committed the same inconsistency. *Compare* 41 F.3d 213, 217-18 (Cert. Pet., at 6a-8a), *with* 41 F.3d at 220 (Cert. Pet., at 12a-13a).

The State is quite right to acknowledge before this Court, if only at this late stage, that "there was *significant evidence* that there were really three shots." Op. Cert. at 15, emphasis added. Indeed, the evidence was more than "significant": there were two spent handgun shells and one dead body, killed by a shotgun.[7] But there was no testimony that was credible and that went to the timing, and especially to the fact that the discharge of Milton Ray Jarmon's .25 shortly preceded the fatal shotgun blast.

Yet the State proceeded to try Petitioner on the theory that there were only two shots fired, **knowing that, on this issue at least, the Jarmon confession was directly corroborative of the principal lines of defense**. With hard evidence in hand to refute its "theory," in other words, the State asked a jury to sentence Ronald Keith Allridge to die. And, in apparent reliance on evidence no better than this, the jury complied.

This Court has provided guidance, in its recent decision in *Kyles v. Whitley*, 63 U.S.L.W. 4303 (April 19, 1995), as to the proper interpretation of the line of cases concerning suppression of evidence, from *Brady v. Maryland*, 373 U.S. 83 (1963), through *United States v. Bagley*, 473 U.S. 667 (1985). *Kyles* demonstrates conclusively that the circuit court erred in applying that line of cases.

Kyles lays down four criteria to determine "materiality" of evidence whose suppression will therefore be unconstitutional under *Brady* and *Bagley*. The first two apply to the case at bar. First, "a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal." 63 U.S.L.W. at 4307. And second, "[a] defendant need not demonstrate that after discounting the inculpatory evidence in

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[7] Even the court of appeals described the prosecution's reliance on a two-bullet "theory" as "somewhat puzzling in light of the evidence." 41 F.3d 213, 218 n.5 (Cert. Pet. , at 7a n.5).

light of the undisclosed evidence, there would not have been enough left to convict." 63 U.S.L.W. at 4308.

This Court therefore raised significant doubt about the Fifth Circuit's conclusion that the allegedly cumulative nature of the confession defeats its qualification as *Brady* material. Petitioner need not prove that the suppressed evidence would have led to a different verdict, although here he invites the Court to agree with him that it would: it would certainly have undermined the State's own two-shot theory, on which it based its case, and it may well also have provided support for the contention that the fatal shot was an involuntary reflex rather than an intentional (much less a deliberate) act of murder.

Ultimately, as Justice Souter wrote for the Court in *Kyles*, "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." *Id.* It is hard to retain confidence in a capital verdict in a case such as this, when the State went to the jury with **a theory specifically contradicted by evidence in its possession, which it deliberately withheld**. Any residual confidence in the outcome is further undermined when the State, on review, defends the proposition that there was already ample evidence for the jury to conclude that its principal theory was wrong anyway, even without the material it failed to produce.

Kyles therefore reaffirms in the strongest terms the need to set aside the decision below. Since the circuit court lacked the benefit of this Court's teaching in *Kyles*, this may be an appropriate case for summary reversal, with instructions to the circuit to conduct further proceedings in light of the recent opinion of this Court.

III. THIS COURT'S OPINION IN *SIMMONS V. SOUTH CAROLINA* IS APPLICABLE AND COMPELLING HERE.

The State incorrectly argues that the nonretroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989), bars Petitioner's claim under *Simmons v. South Carolina*, 114 S.Ct. 2187 (1994). In addition, the State relies on a misinterpretation for the contention that the *Simmons* rule cannot apply in Texas death penalty cases.

A. *Simmons* Does Not Create a "New Rule" for the Purposes of Nonretroactivity under *Teague*.

Mindful of the serious mischief threatened by a broad application of the nonretroactivity rule of *Teague*,[8] the *Simmons* plurality went to great pains to illustrate that its holding was squarely rooted in "well-established precedents interpreting the Due Process Clause."[9] 114 S. Ct. 2187, 2194-5 (1994). Although the line of cases interpreting *Teague* has defined the crucial term "new rule" a number of ways, only one **clear** principle emerges: a decision that "explicitly overrules an earlier holding" is obviously a new rule. *See Butler*, 494 U.S. at 412-13. In cases similar to the instant one, however, "where the new decision is reached by an extension . . . of previous cases the inquiry will be more difficult." *Id.* Therefore, this Court has had to draw distinctions to determine whether or not cases relying on precedent announce new rules. Even when applying its broadest view of *Teague*, this Court has repeatedly characterized decisions that are "**compelled**" by existing precedents as **not** being "new rules "for purposes of nonretroactivity under *Teague*.[10] The *Simmons* plurality carefully

[8] *See Butler v. McKellar*, 494 U.S. 407, 417-33 (1990) (Brennan, J., dissenting); *Saffle v. Parks*, 494 U.S. 484, 495-515 (1990) (Brennan, J., dissenting); *Sawyer v. Smith*, 497 U.S. 227, 245-54 (1990) (Marshall, J., dissenting); *Wright v. West*, 112 S. Ct. 2482, 2496-97 (1992) (O'Connor, J., dissenting).

[9] The Court in *Kyles* similarly went out of its way to demonstrate that in reversing the opinion below, it was doing nothing more than applying *Brady* and its progeny. *See* 63 U.S.L.W. at 4303.

[10] *See, e.g., Saffle*, 494 U.S. at 491; *Sawyer*, 497 U.S. 227 at 236.

wrapped its opinion in a blanket of indicia that it was **not** announcing a "new rule."

The State claims that *California v. Ramos*, 463 U.S. 992 (1983) was controlling when Petitioner's conviction became final. Op. Cert., at 17-18. This argument is without merit. *Ramos* stands for the proposition that the relevance of parole and clemency is resolved under state law where the states "provide **greater protections** in their criminal justice system than the Federal Constitution requires." 463 U.S. at 1013-1014. Future dangerousness as an explicit jury issue, which determined Petitioner's sentence of death, was simply not considered by the Court in *Ramos*. In light of the pre-1989 line of decisions holding that defendants have a due process right to present evidence to rebut the prosecution's reliance on contentions of future dangerousness,[11] it was not reasonable to conclude that *Ramos* controlled Petitioner's case. Consequently, *Ramos* does not render *Simmons* a new rule for *Teague* purposes. *See Stringer v. Black*, 112 S. Ct. 1130, 1140 (1992).

B. The Rationale of *Simmons* Applies to the Facts Here and Compels the Same Result.

To support its contention that *Simmons* does not apply to Petitioner's claim, the State relies **solely** on a selection from *Simmons* taken out of context. Op. Cert., at 18-20. Even a cursory reading of the opinion, however, reveals that the Court was summarizing the general holding of *Ramos*, not of *Simmons* itself. The rationale and rule of *Simmons* are set forth in the paragraph directly following the State's misleading quote:

> But if the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. *Because truthful*

[11] *See Simmons*, 114 S. Ct. at 2194.

> *information of parole ineligibility allows the defendant to "deny or explain" the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.*

Simmons, 114 S. Ct. at 2196 (citation omitted; emphasis added).

The distinction between *de jure* and *de facto* parole ineligibility is irrelevant. Because Texas expressly includes future dangerousness in the sentencing phase of capital trials, *Simmons*, not *Ramos*, applies. Thus Petitioner had a due process right to present factual evidence regarding his parole ineligibility.

IV. PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF THE OPPORTUNITY TO INTRODUCE MITIGATING EVIDENCE.

As to this issue, Petitioner respectfully directs the Court to the arguments made at pages 29-30 of his original Petition. He would point out, however, that the State's only response to those arguments is an oddly inapposite citation to Justice O'Connor's concurrence in *California v. Brown*, 479 U.S. 538, 545 (1987). That language recognizes that a defendant whose criminal acts are attributable to his disadvantaged background, or mental or emotional problems, may entail less culpability "than defendants who have no such excuse." Op. Cert., at 22.

But nowhere does Justice O'Connor suggest that her list of limitations on culpability is intended to be exhaustive. Thus it simply does not follow, as the State of Texas would have it, that "[b]ecause Allridge failed to show that his crime was attributable to his alleged mental problems and child abuse, he has not demonstrated a constitutional violation." *Id.* The State errs by mistaking a delineation of **sufficient** conditions as a specification of what is **necessary**: an elementary if fatal error of logic.

CONCLUSION

For all of these reasons, as well as for those set out in the Petition herein, the writ of certiorari should issue.

Respectfully submitted,

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